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HAROLD B. WILLEY, C

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1953

## No. 428

HARLEY O. TEETS, as Warden of the California State Prison at San Quentin, and THE PEOPLE OF THE STATE OF CALIFORNIA,
*Petitioners,*

vs.

HENRY THOMAS,
*Respondent.*

**PETITION FOR CERTIORARI TO BE DIRECTED TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.**

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*Respondent.*

## PETITION FOR CERTIORARI TO BE DIRECTED TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

*To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

Edmund G. Brown, Attorney General of the State of California, on behalf of Harley O. Teets, Warden

of the California State Penitentiary at San Quentin, California, and The People of the State of California pray that a writ of certiorari be issued to review the judgment entered April 27, 1953 by the United States Court of Appeals for the Ninth Circuit.

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## OPINIONS BELOW.

### 1. The opinions of the Federal Courts.

The order of the District Judge denying the application of Henry Thomas for a writ of habeas corpus is unreported. (R. 8.)

The order of Chief Judge Denman granting a certificate of probable cause and stay of execution is reported at *191 Fed. 2d 360.*

The first opinion of the Court of Appeals reversing the order of the district judge is unreported but appears at page 16 of the record.

The amended opinion filed on denial of rehearing is reported at 205 Fed. 2d 236. (R. 32.)

### 2. The opinion of the State Court.

The opinion of the California Supreme Court on the appeal of Thomas' conviction appears in *People v. Thomas,* 37 Cal. 2d 74; 230 Pac. 2d 351, and is printed in full in the Appendix to this brief.

The California Supreme Court denied Thomas' application for a writ of habeas corpus without opinion. Certiorari was denied.

## JURISDICTION TO REVIEW.

The jurisdiction of this Court is invoked under the Judicial Code of 1948, Title 28 U.S.C., § 1254 (1); Title 28 U.S.C. § 1201(c).

The judgment and order sought to be reviewed was entered April 27, 1953. The ninety-day period within which petitioner may seek certiorari pursuant to Section 2101(c) of Title 28 U.S.C. runs from the date of denial of rehearing which in this case was June 27, 1953. (R. 32.)

The time within which to apply for certiorari has been extended to October 23, 1953 by a member of this Court. (R. 41.)

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## QUESTIONS PRESENTED.

1. Whether the Court of Appeals can overrule the California Supreme Court on a matter of California law.

2. (a) Will delay in filing a petition for certiorari in a death penalty case create as a matter of law "an exceptional circumstance" and relieve petitioner of the obligation to exhaust his State remedies as required by *Darr v. Burford,* 339 U.S. 200.

(b) Under such circumstances may a judge of the Court of Appeals stay the execution of a judgment of a State Court in order to allow a petitioner to exhaust his State remedies, especially after a district judge has denied petitioner such relief?

3. Must a judge accept as true the allegations contained in a petition for habeas corpus when the record in the State Court contradicts such allegations?

4. Do promises or threats to induce a plea of guilty made long prior to arraignment constitute a deprivation of due process when at the arraignment a plea of guilty is entered on advice of counsel and after an attempt is made by counsel to barter with the judge on the matter of sentence?

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**STATEMENT OF THE CASE.**

Henry Thomas, having pleaded guilty to murder (Calif. Penal Code, § 187) the California Court found the murder to be of the first degree and imposed the death penalty.[1] An automatic appeal was taken to the California Supreme Court by operation of law. Charged with Thomas, was William McCain, who pleaded not guilty. McCain was tried by jury, found guilty and the jury fixed his punishment at life imprisonment.

According to the evidence taken when the degree and punishment were fixed, and at the preliminary hearing, Mr. and Mrs. Ainsworth were managing a grocery store near Hatfield, Siskiyou County, California, on October 20, 1950. About 5:30 in the afternoon, while the Ainsworths were present in the store,

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[1]The facts relating to the crime and proceedings which resulted in Thomas' conviction are contained in the opinion of the California Supreme Court, reported at 37 Cal. (2d) 74 and printed as an appendix to this petition.

Thomas and McCain entered it, McCain in the lead. Thomas ordered soft drinks. McCain drew a pistol and stated it was a holdup. Thomas also drew a pistol. Ainsworth grasped the barrel of the pistol held by McCain and in the ensuing struggle it was discharged, a bullet striking and wounding Mr. Merrill, who entered the store at that time. After McCain's gun discharged, Thomas fired several shots from his pistol, two of which struck Mrs. Ainsworth, causing her death. McCain and Thomas fled and were finally apprehended in Bakersfield.

Thomas was held to answer following a preliminary examination and an information was filed against him. On December 4, 1950, he was arraigned and not having means to employ counsel, one was appointed for him—Mr. Mark M. Brawman. Time to plead was set for December 6, 1950, at his counsel's request. At that time, after a brief appearance in Court, counsel for defendant and McCain's counsel, and the district attorney retired to the judge's chambers where the judge said that Mr. Brawman had spoken to him in regard to the possibility of defendant's avoiding the death penalty by making a "certain" plea. The judge remarked that he had read the transcript of the preliminary hearing and that he was "inclined" to give the "extreme" penalty whether he pleaded guilty or not guilty. On returning to Court, Thomas pleaded guilty and December 11, 1950, was fixed as the time for "pronouncing judgment," later continued to December 14, 1950, when the Court announced it would hear evidence on the degree of the offense. The district

attorney called decedent's husband, Ainsworth, to the stand and he testified to the facts relating to the killing. Thomas' counsel was asked by the Court if he wished to cross-examine, and declined. The Court then remarked, "Step down (addressing the witness). I don't think we will need any further." The district attorney then made the same remark, to which the Court replied, "All right." Thomas' counsel remained silent. The Court then stated that it was murder of the first degree. Thereafter when asked by the Court whether he had any legal cause to show why sentence should not be pronounced, Thomas stood mute. The death penalty was imposed.

Thomas urged two grounds for reversal before the California Supreme Court: (1) that the trial Court erred in failing to take evidence to ascertain the penalty to be imposed; (2) the penalty should be reduced to life imprisonment under Section 1260 of the *California Penal Code*, as amended in 1949.

(Stats. Calif. 1949, ch. 1309, Sec. 1.)

On his appeal to the California Supreme Court Thomas was represented by Mark M. Brawman, who had represented him before the trial, and George A. Tebbe, both of whom served under appointment by the California Supreme Court.

The judgment against Thomas was affirmed by the California Court on May 1, 1951.

No attempt was made to review the judgment of the California Supreme Court by certiorari.

The date of Thomas' execution was fixed for August 31, 1951, approximately 90 days after the judgment had been affirmed. (R. 5.)

On August 20, 1951, Thomas filed in *propria persona* in the Supreme Court of California a petition for a writ of habeas corpus. Then, for the first time, he alleged that the sheriff who had him in custody told him that he didn't have a chance before a jury but that if he entered a plea of guilty the judge would give him life, and that if Thomas didn't co-operate, he, the sheriff, "might let word get around and some people might not wait for a trial but might come and string me [Thomas] up." (R. 4-8.)

Thomas also alleged for the first time that his Court appointed attorney said (and we quote from the petition):

> ". . . Then he said from what he had heard about the case I was guilty and he wouldn't fight it in front of a jury. He told me the only thing for me to do was to plead guilty. He said, like the sheriff, that if I went in front of a jury I would get gassed sure. I tried to tell him the shooting was an accident. That I was drunk and about my service in the army, but he said that wouldn't make any difference. I believed him and the sheriff. He said if I plead guilty he thought the judge would give me life. He said he knew the judge real well and he would talk to the judge and the judge would sure give me life if I plead guilty and save everybody a lot of trouble and the county the expense of a jury trial.
>
> "I figured him and the sheriff must know what they were talking about and that they would see

I got life if I did what they told me. Kept my mouth shut and plead guilty.

"When I went to plea, Mr. Brawman was there and recess was called and Mr. Brawman and my partner's attorney and the district attorney, Mr. Burton went into the judge's chambers and had a talk. I wasn't there but was left outside. When my attorney came back out, the district attorney said if I fought this case he was going to put me in the gas chamber, but he wouldn't ask the judge to gas me if I pled guilty. My attorney heard him say this and nodded his head that was what would happen. By this time I was too scared to plead not guilty, like I thought I should, and let a jury decide what punishment to give me. So I pled guilty because I was sure the sheriff would keep his promise to see the judge and get me life and that my attorney would talk to the judge and get me life.

But the judge sentenced me to die. I don't think now the sheriff ever did talk to the judge. I think he lied to me to get me to plead guilty, and my attorney didn't talk to the judge like he told me he would. He didn't even give me a chance to tell my story to the judge. After I pled guilty the district attorney only put on one witness. This was the husband of the lady who got killed. My attorney didn't even ask this man any questions at all. He didn't say a word for me to the judge. He didn't say anything and after I lost my appeal and sent for the transcript of what happened in the Superior Court I read what happened in the judge's chambers when I wasn't there and the judge warned my attorney he would give me the gas if I plead guilty but my attorney

never told me that. You can see this is true at pages 7 and 7-A of the reporter's transcript. He never said a word about it. If I had known I wouldn't have plead guilty. The judge appointed Mr. Brawman to represent me but he never said a word for me in Court. He didn't even tell me the judge had warned him. All he did was to tell me to plead guilty and then never say anything for me or warn me I was going to get gassed. Wasn't this wrong and against the law? I only plead guilty because I was promised life and scared out of pleading not guilty. If the sheriff hadn't promised me life for pleading guilty and scared me out of pleading not guilty and my attorney and the district attorney hadn't talked to me like they did I would have got a jury trial. That was what I wanted.

The man who was charged with the crime with me went before a jury and a jury gave him life."

(R. 6, 7.)

This habeas corpus petition was in longhand. It was denied by the California Supreme Court on August 28, 1951, without opinion.

It must be remembered that the California Supreme Court when it denied Thomas' petition for habeas corpus had in its files and could judicially notice the record on appeal in the case of *People v. Thomas,* 37 Cal. 2d 74.[2]

[2]Set out in the appendix to this petition is a certified copy of a portion of the records of the California Supreme Court showing the proceedings before the trial Court at the time of the arraignment of Thomas.

Telegraphic application for a stay of execution was made to Mr. Justice Jackson and denied. No application was made for certiorari as far as we can ascertain.

On August 29, 1951, Thomas addressed a letter to the District Court and prayed for a writ of habeas corpus. (R. 1.) Attached to the letter was a copy of the petition theretofore filed in the State Court. (R. 4.) The same grounds for relief were relied on.

The district judge denied the petition, stating:

> "I have reviewed the allegations set forth therein and, all circumstances being considered, find them insufficient to warrant the intervention prayed for." (R. 8.)

An application for a certificate of probable cause was likewise denied by the district judge. (R. 10.)

A notice of appeal was filed by Court-appointed counsel (R. 10) and a certificate of probable cause was granted by Chief Judge Denman of the Court of Appeals. (191 Fed. 2d 360.)

Thereafter, the appeal was argued before a panel of the United States Court of Appeals, Ninth Circuit, and submitted. (R. 14.)

The submission was set aside and the cause then argued before the Court of Appeals in Bank and again submitted. (R. 15.)

In due course the appellate court filed its opinion reversing the district court, three judges dissenting. (R. 16-24.) A petition for a rehearing was filed (R.

25) and thereafter an amended opinion was filed and the petition for a rehearing was denied, three judges still dissenting. (R. 32-40.)

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**REASONS FOR GRANTING THE WRIT.**

The State of California speaking through the Warden of its State Prison is greatly concerned with the situation that has developed in the Court of Appeals for the Ninth Circuit.

The United States District Courts have dismissed petitions because the petitioner had failed to exhaust his state remedies, including certiorari to the United States Supreme Court. The Court of Appeals, three judges dissenting, issues orders of probable cause for appeal, stays execution of the judgment, etc., so that the petitioner may thereafter exhaust his remedies. Thus delays are automatic, and the studied failure to exhaust the state remedies works to the advantage of the dilatory petitioner.

The United States District Courts have adopted the practice of filtering the stereotyped allegations of lack of due process through the spectrum of the record before the State Court in an effort to ascertain the truthfulness of petitioner's allegation. The Court of Appeals, three judges dissenting, decrees that the district Court "must assume these allegations are true." (R. 33.) Thus a premium is placed on perjury and if perjury is resorted to a delay of execution of the state judgment for a period of from six months to two years follows as a matter of course.

Our concern is not a "baseless fear, a bogeyman" that state penitentiaries will be emptied. We have handled over a hundred habeas corpus cases attacking state judgments. We have yet to lose a single case. We have yet to find a single case in which there was deprivation of "due process." If prisoners unjustly convicted were released we would not be complaining.

Our concern is based upon the fact that in scores of cases egocentric prisoners file petitions for habeas corpus containing "stock" allegations not based on fact and more often than not contrary to the record in the state court and thus prolong litigation and delay the execution of state judgments.

Of course, we recognize that the writing of prison-made petitions may have some value as vocational rehabilitation and as a builder of the morale of the prisoner. We contend, however, that the damage done to the integrity of the judicial process by this clash of courts, by this unwarranted intrusion of one jurisdiction into the affairs of another far outweighs any possible good that may come of the practice complained of.

Our complaint is not without justification: pending in the Court of Appeals, Ninth Circuit or en route to this Court via application for certiorari are the following death penalty cases: *Dusseldorf v. Teets, Wells v. Duffy, Chessman v. Teets,* and *this* case.

In support of our position we enumerate the specific grounds for the granting of the writ of certiorari.

**1. CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE COURT OF APPEALS HAS OVERRULED THE SUPREME COURT OF CALIFORNIA ON A MATTER OF CALIFORNIA LAW, NAMELY, WHETHER CALIFORNIA LAW REQUIRED THAT THE CALIFORNIA SUPREME COURT GRANT THE APPLICATION OF HENRY THOMAS FOR A WRIT OF HABEAS CORPUS.**

It has always been recognized that the exercise of jurisdiction in habeas corpus by the federal Courts when the prisoner is in custody under State process is exceedingly delicate. The elaborate judicial doctrine of exhaustion of State remedies now codified in 28 U.S.C. 2254 developed out of considerations of comity designed to avoid interference and conflicts between the state and federal Courts of coordinate jurisdiction. (*Darr v. Burford,* 339 U.S. 200.)

These considerations are being ignored by the Court of Appeals for the Ninth Circuit. Certiorari should be granted and the case reviewed by this Court because the Court of Appeals, in a 4-3 decision, has gone to the astounding length of purporting to overrule the Supreme Court of California on a matter of California law.

It is difficult, if not impossible to imagine a more striking violation of the requirements of comity and mutual respect in this delicate field.

The California Supreme Court, by denying Thomas' application for writ of habeas corpus, has held that Thomas is not entitled to that writ in California. The majority of the Court of Appeals holds that under California law Thomas was entitled to the writ. The majority concludes that when the Supreme Court of

California failed to correctly apply the California law it denied to Thomas due process of law.

> "Thomas chose to apply to the California Supreme Court where his application is identical with his application below. Since the application alleged a violation of due process which was *dehors* the record of the State criminal proceeding, the Supreme Court was required to issue the writ (Penal Code, Section 1476, Section 1483). Here again Thomas was denied due process—that of the State. The California Supreme Court did not issue the writ. Without opinion it merely entered a bald order that Thomas' application was denied." (205 F. 2d 240.) (R. 36.)

It is apparent from this language that the majority of the Court of Appeals is in conflict with the Supreme Court of California on a matter of California law. This Court scrupulously avoids even the most remote possibility of such an occurrence. (Cf. *Dixon v. Duffy,* 344 U.S. 143.)

This conflict between the Supreme Court of California and the majority of the Court of Appeals should be resolved by this Court on certiorari. It is submitted that the availability or nonavailability of the writ of habeas corpus in California is a matter exclusively for the determination of the California judiciary.

**2. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE CALIFORNIA SUPREME COURT DENYING THOMAS' APPLICATION FOR WRIT OF HABEAS CORPUS ON THE QUESTION OF WHETHER THOMAS HAS BEEN DENIED DUE PROCESS OF LAW. MOREOVER, THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH CANIZIO v. NEW YORK (1945), 327 U.S. 82, DECIDED BY THIS COURT.**

In this case the Supreme Court of California was presented with a petition for a writ of habeas corpus by a prisoner under sentence of death. The petition and the previous record of the case on appeal showed that the prisoner had pleaded guilty of murder on the advice of his counsel.[3] The petition and the previous record also showed that petitioner's counsel had attempted to make a deal with the judge but the judge had refused. After the sentence of death was imposed an appeal was taken to the Supreme Court of California. New counsel was appointed to assist in the appeal. Briefs were submitted and the cause was argued. The judgment was unanimously affirmed.

Then, ten days before the date set for execution, came the petition for habeas corpus. It alleged that some time prior to all these judicial proceedings the prisoner had been promised life imprisonment if he pleaded guilty by his custodian, the sheriff, and had been threatened with lynching if he did not do so. He alleged that his attorney also promised him life

[3]It must be remembered that the California Supreme Court had in its file the record in the case of *People v. Thomas*, 37 Cal. (2d) 76, in which case it had reviewed the very facts and circumstances referred to in the petition for habeas corpus. A certified copy of the material portion of that record appears in the appendix.

if he would plead guilty—and that the attorney promised to see the judge about it. As a result of these promises, the petition alleged, petitioner was fraudulently induced to plead guilty. The California Supreme Court denied Thomas' application without inquiring into the truth or untruth of the allegations relating to the threats or promises of the sheriff except as the Court inferred untruth from facts which it could judicially notice and from the facts disclosed by its order filed in the record in *People v. Thomas.* Thus the implicit holding of the California Court is that these allegations are untrue and/or immaterial.

The majority of the Court of Appeals considers these allegations to be crucial. They have held that the allegations must be assumed to be true and therefore Thomas is entitled to discharge from his present restraint.

The California Courts will not allow a conviction to stand where a plea of guilty has been induced by threats and promises of a state official. (*In re Hough,* 24 Cal. 2d 522, 150 P. 2d 448; cf. *People v. Gilbert,* (1944), 25 Cal. 2d 422, 154 Pac. 2d 657.)

But in this case the prisoner was represented by counsel and entered the plea of guilty on the advice of his counsel. *These facts appear on the face of the petition for writ of habeas corpus.* Prior to the entry of a plea petitioner's counsel attempted to make a deal with the trial judge and was specifically warned that no deal could be made. *These facts appear in*

*the petition itself and in the opinion and records of the case on appeal in the California Supreme Court.*

The Court of Appeals gives no weight to the fact that counsel was appointed subsequent to the alleged threats and conduct of the sheriff and that the plea of guilty was concededly entered on the advice of counsel. The Court of Appeals gives no weight to the fact that counsel never moved to withdraw the guilty plea and that the threats now alleged to be the proximate cause of the guilty plea were not communicated to any Court until 10 days before the execution date. Here is the conflict between the federal and state judiciary. This conflict should be resolved by this Court on certiorari.

Moreover, under the applicable decisions of this Court it is submitted that the interpretation of the California Supreme Court was correct.

In *Canizio v. New York* (1945), 327 U.S. 82, the petitioner pleaded guilty in a New York Court without the assistance of counsel and without notice of the charge against him. Accepting this plea was reversible error and a denial of due process guaranteed by the Fourteeenth Amendment. (*Hawk v. Olsen,* 326 U.S. 271.) But subsequently and before sentencing, counsel was appointed for the accused. This Court held, in an opinion by Mr. Justice Black, that since counsel could have moved to withdraw the guilty plea, and he elected not to do so, the petitioner could not collaterally attack the invalid guilty plea. In the

opinion the Court recognized that if counsel had made such a motion to withdraw the plea it would have had to be granted and if it were not granted the United States Supreme Court would have reversed. But by making the conscious election he had waived his right to question the validity of the plea.

If Thomas had entered his plea *prior* to the appointment of counsel, this case would be on all fours with *Canizio*. *A fortiori,* the State of California did not deny Thomas due process, since the attorney was appointed prior to the entry of the plea, and the attorney would never have advised the entry of the guilty plea if he had not thought it to be in his client's best interests.

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**3. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS, THREE JUDGES DISSENTING, HAVE HELD THAT IF A PRISONER IN STATE CUSTODY DELAYS SEEKING THE POST-CONVICTION CORRECTIVE PROCESS OF THE STATE UNTIL THE LACK OF TIME MAKES SUCH PROCESS INEFFECTIVE TO PROTECT HIS RIGHTS, THE PRISONER HAS A RIGHT TO HABEAS CORPUS IN THE FEDERAL COURTS NOTWITHSTANDING HIS FAILURE TO EXHAUST HIS STATE REMEDIES.**

Thomas was sentenced to death in December, 1951. His conviction was affirmed on May 31, 1951. He did not invoke the post-conviction corrective process of the State of California until August 20, 1951—ten days before the date set for his execution. California denied him relief on August 28. Thomas immediately filed in the Federal District Court without petitioning

this Court for certiorari to review the California determination. It is conceded that at the time of his application in the Federal District Court he had not exhausted his State remedies. (*Darr v. Burford*, 339 U.S. 200.) However, it was alleged that lack of time to exhaust his State remedies because of the imminence of the death sentence constituted a circumstance rendering the State process ineffective to protect his rights within the meaning of 28 U.S.C. 2254.

The Court of Appeals has held in reversing the district judge that this lack of time was an exceptional circumstance as a matter of law.

Thomas knew that the sheriff's promises, if they occurred, were false when the judge sentenced him to death. Nevertheless, he waited eight months until the eve of his execution before he attempted to seek relief in California. It is said he was awaiting the outcome of his appeal and then an application for executive clemency. But neither of these proceedings had anything to do with the claimed lack of due process in his conviction. An application for executive clemency is not even a judicial proceeding.

If lack of time excuses the failure to apply for certiorari, it will excuse the failure to exhaust other State remedies. For example, one might, by waiting until the last minute, fail to seek any relief in the State Courts and thus, under the holding in this case, force jurisdiction on the Federal Courts.

It is important that this question be settled by this Court. Of course, we realize that it will be a rare

and daring prison litigant, indeed, who will intentionally forego the attempt to secure relief in the State Courts with the idea of foisting jurisdiction on the Federal Courts in reliance on this case. However, this is not the problem with which we are concerned. We are concerned with the very practical and common problem of the desperate prisoner awaiting the death sentence who files a last-minute application in the Federal Courts. This case would require the Federal judge to dispose of those petitions on their merits. Understandably, this could not be a summary proceeding; it would take time. And if the district judge stays the execution for even one hour after the time fixed in the order of the California Court, the warden is powerless to carry out the judgment. He must await the fixing of another execution date which means a delay of no less than sixty days. To thus stall the judicial processes of the State of California creates a tremendous burden on the prison administrators and hampers the effective enforcement of California law.

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**4. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS SANCTIONED AN APPLICATION OF DARR v. BURFORD, 339 U.S. 200, AS IT APPLIES TO EXHAUSTION OF STATE REMEDIES WHICH SUBVERTS THE DOCTRINE AND IN REALITY MAKES THE DOCTRINE AN INSTRUMENT FOR THE PROLONGATION OF LITIGATION.**

The Court of Appeals has again approved of the practice of the district judge in *Ex parte Wells,* 90 Fed. Supp. 855, 99 Fed. Supp. 320, to wit, the practice

of retaining jurisdiction in the Federal Courts in order to allow the petitioner to exhaust his State remedy.

The majority of the Court of Appeals in this case, in reliance on their prior decision in *Duffy v. Wells*, 201 Fed. 2d 503, has held that the district judge should have retained jurisdiction and stayed the execution of the judgment to allow Thomas time to exhaust his State remedies.

We had no opportunity to review that practice in the *Wells* case because the Court of Appeals ultimately ruled in our favor on the case in chief. We have that opportunity now.

In the *Wells* case the district judge found that Wells had not sought relief in California. Instead of dismissing the application the district judge retained jurisdiction in order to allow Wells to seek relief in his State Courts.

The Court of Appeals approved of this practice in *Duffy v. Wells* (9 Cir.), 201 Fed. 2d 503, 504. In the case at bar the Court of Appeals again approves of the practice, stating that 28 U.S.C. 2254 does not deny jurisdiction where State remedies have not been exhausted but merely requires that the application shall not be "granted." The Court of Appeals takes this language to mean that the district judge may "entertain" an application and hold it pending exhaustion of State remedies, the only prohibition being against "granting" the relief sought.

This question should be decided by this Court on certiorari. For, as applied by the Court of Appeals, it is illustrative of the manner in which the Ninth Circuit is presently ignoring the considerations of comity which underlie the principle of exhaustion of State remedies.

The doctrine of exhaustion of State remedies presupposes—in fact is predicated upon the assumption that the State Courts will correctly apply the Constitution of the United States.

The retention of jurisdiction by a Federal Court to allow the applicant to seek relief in the State obviously presupposes that the State will not correctly apply the United States Constitution. Why else retain jurisdiction?

This practice in vogue in the Ninth Circuit in effect places the California judiciary on a sort of probation with the Federal Courts acting as a sort of judicial probation officer retaining jurisdiction in the event that the California Courts should come to the wrong conclusion. Far from comity, this is outright disrespect.

5. **THE COURT OF APPEALS, THREE JUDGES DISSENTING, HAVE HELD THAT ON APPEAL FROM THE DENIAL OF A WRIT OF HABEAS CORPUS THEY ARE "REQUIRED TO ASSUME THESE ALLEGATIONS [OF THE PETITION] ARE TRUE". (R. 33.) THUS, THE DISTRICT JUDGE IS PRECLUDED FROM CONSIDERING THE RECORDS OF THE STATE COURT PRIOR TO A HEARING IN ORDER TO TEST THE TRUTHFULNESS OF THE ALLEGATIONS, ASCERTAIN WHETHER THE STATE COURT HAS ADEQUATELY CONSIDERED THE PETITIONER'S CLAIMS, AND TO DETERMINE WHETHER, ALL CIRCUMSTANCES BEING CONSIDERED, THE CASE WARRANTS FEDERAL INTERVENTION. THIS HOLDING IS IN DIRECT CONFLICT WITH THE HOLDING OF THIS COURT IN BROWN v. ALLEN, 344 U.S. 433, AND WITH THE HOLDING IN DORSEY v. GILL (D.C. 1945), 148 FED. 2d 857.**

This Court should decide on certiorari whether the allegations in a petition for writ of habeas corpus must be taken as true.

If the rule as stated by the Court of Appeals is allowed to stand the elaborate and exhaustive directives of *Brown v. Allen,* 344 U.S. 433, are abrogated in the Ninth Circuit. It will be meaningless for the federal district judge to exercise his sound judicial discretion under the guides so elaborately set out in *Brown v. Allen,* 344 U.S. 433 if the Appellate Courts must assume that all the allegations in the petition are true.

This question is of great importance in the administration of federal habeas corpus jurisdiction over prisoners in custody under state process. All the problems and difficulties which were recognized by this Court in the recent case of *Brown v. Allen* are again presented by the operation of this appellate rule as applied to the United States Court of Appeals for

the Ninth Circuit. This Court in *Brown v. Allen* pointed out clearly and carefully that in this delicate field the district judge is required to exercise his judicial discretion. Furthermore, the recent opinion carefully lays down the standards to guide the district judge in the exercise of this discretion. Clearly the question for the Appellate Court when it reviews the denial of an application by a federal district judge must be whether this discretion has been abused and whether the petitioner has stated a cause of action.

This Court should decide whether *Brown v. Allen* should be the law of the Ninth Circuit or whether the Court of Appeals may by the application of this appellate rule nullify the mandate of that case.

Let us examine with some care the petition and record in this case.

The burden of Thomas' complaint against the proceedings in the state Court is:

1. He was promised life imprisonment by the sheriff and a jailer if he entered a plea of guilty and therefore his waiver of a jury trial was under duress.

2. He was promised life imprisonment by his attorney if he entered a plea of guilty.

3. He was "scared" into entering a plea of guilty by the sheriff by reason of threats of mob violence if he persisted in entering a plea of not guilty and demanding a jury trial and therefore his waiver of a jury trial was under duress.

4. That an important part of the trial took place without his presence.

And for these reasons he was denied due process.

It must be remembered that the habeas corpus petition presented to the California Court was presented to the identical Court which affirmed the judgment then and now under attack (*People v. Thomas,* 37 Cal. 2d 74), and the conclusions of that Court were binding on the District Court and all other Federal Courts. (*Adamson v. California,* 332 U.S. 46, 58, 91 L. Ed. 1903, 1912.)

What really happened in the California Court?

Of course, if any acts of coercion or pressure, threats or otherwise, were used to extract a plea of guilty—these matters occurred prior to the entry of the plea.

Thomas was at the time of the entry of the plea and thereafter, represented by counsel appointed by the trial Court and later by the Supreme Court of California.

The decision of the California Supreme Court points out that before Thomas entered his plea Thomas' counsel and the counsel for McCain, his partner in crime, were called into the judge's chambers by the judge "where the judge said that Mr. Brawman [Thomas' attorney] had spoken to him in regard to the possibility of defendant's avoiding the death penalty by making a "certain 'plea' ". (37 Cal. 2d 78.) The Court definitely advised counsel that he was "inclined" to give the extreme penalty.

After this admonition Thomas entered a plea of guilty.

What more could a Court do to protect a defendant?

Even if Thomas had been promised life by someone —here was positive notice that no deal could be made.

Neither Thomas nor his counsel made any suggestion that a promise had been made. Neither Thomas nor his counsel made even the slightest suggestion that they feared mob violence.

The record in this case—and by that we mean the petition herein and the facts as recited by the California Court—brand the contentions that a plea of guilty was coerced by the promises and threats as a colossal fraud engineered by the law students on San Quentin's death row.

There are additional facts which were before the District Court and before the California Courts.

After the judge advised Thomas and McCain of his inclination McCain entered a plea of not guilty, had a jury trial and the jury fixed his punishment at life imprisonment. McCain, like Thomas, was a Negro. Both had their choice. There is no reason to suspect that Thomas was treated any differently than McCain. Each defendant had to make his choice. Thomas relied on the judge and McCain took his chances with a jury.

When Thomas was sentenced to death neither he nor his attorney made the slightest suggestion that a promise of life imprisonment had been made as a consideration for a plea of guilty. Neither did either of them complain of the threat of mob violence.

The alleged threat of mob violence was connected with the fact that Thomas is a Negro. When considering the alleged threat of mob violence aimed at this Negro defendant the Courts may consider the historical fact and as a matter of common knowledge that never in the history of California has there been a threat of lynching arising from the fact that the object of the mob was of the Negro race. This is common knowledge and an historical fact of which the Court must take notice. (*Code of Civ. Proc.*, California, sec. 2102.)

These were all matters which were before the California Court when it denied Thomas' petition for habeas corpus.

These were all matters which the District Court could consider.

If they were not adequately before the District Court the failure is Thomas'.

> "As the burden of overturning the conviction rests on the applicant, he should allege specifically, in cases where material, the uncontradicted evidentiary facts appearing in the record upon which is based his allegation of denial of constitutional rights."
>
> *Brown v. Allen*, 344 U.S. 433, Note 6.

See also:

*Dorsey v. Gill*, 148 Fed. 2d 857.

These facts were all matters of record which if accepted by the district judge compelled the conclu-

sion that the naked allegations of the petition were false.

But the Court of Appeals in this case says that the allegations of the petition must be assumed to be true. It thus places its imprimatur on this particular petition and we may expect to encounter it again and again unless this Court intervenes.

By its holding in this case the Court of Appeals directs the District Court to give no effect to the state Court adjudication contrary to the rule in *Brown v. Allen.*

Furthermore, it is respectfully submitted that the holding of the majority of the Court of Appeals is erroneous. The only authority cited for the rule is *White v. Ragen*, 324 U.S. 760, 763. In that case this Court was exercising its certiorari jurisdiction to review the denial of an application for writ of habeas corpus by the Illinois Supreme Court. In a *per curiam* opinion it was held that since the Illinois Supreme Court dismissed the petition without requiring an answer the reviewing Court must assume that the petitioner's allegations were true.

There is no authority for applying this appellate rule of the Supreme Court of the United States to the Court of Appeals' function in reviewing a federal district Judge's denial of an application for writ of habeas corpus. In fact as we have pointed out the plain implication of *Brown v. Allen* is to the contrary.

**6. DESPITE ITS AMENDED DECISION, THE COURT OF APPEALS HAS MADE THE ALLEGED FAILURE OF COUNSEL TO ADVISE PETITIONER, A DENIAL OF DUE PROCESS AND THUS HAS RENDERED A DECISION IN CONFLICT WITH DIGGS v. WELCH, 148 FED. 2d 667, AND DORSEY v. GILL, 148 FED. 2d 857.**

The Court of Appeals in its original opinion held that the unrefuted allegations of the petition that the failure of petitioner's counsel to properly advise him showed "the clearest abuse by an officer of this court of his obligation of efficient representation and a violation of the due process clause of the Fourteenth Amendment". (R. 19.)

Upon petition for a rehearing it was pointed out that the Court of Appeals had erred in this particular. The Court did not grant a rehearing but attempted to clean up its opinion. It deleted the quoted portion of the opinion but continued the vice complained of. Convinced against its will the Court could argue still and persisted in its error by holding:

> "* * * Had his attorney not concealed from him the judge's statement, Thomas certainly would have pleaded not guilty and would have had his trial by jury. Such alleged wrongful conduct of the attorney may not be an act of a state officer in violation of the due process clause of the Fourteenth Amendment. However, this allegation if proved is an answer to the possible contention that the act of the sheriff was not the proximate cause of Thomas' plea of guilty because his attorney had advised him before his plea of the judge's intention if he pled guilty."

The Court in fact holds that the failure of Thomas' counsel is one of the essential facts upon which the deprivation of due process is based.

This holding overlooks and completely misconceives the protection given to an accused by the Fourteenth Amendment. The Fourteenth Amendment does not protect an accused from erroneous or even unscrupulous activities by third persons; it only protects an accused from unscrupulous activities by the state.

Allegations of even serious mistakes on the part of defense counsel, that he failed to have a defendant testify or offer testimony in his behalf, failed to properly prepare for trial or obtain available evidence; or did not ask for a change of venue or continuance, or take an appeal are not sufficient in and of themselves to warrant habeas corpus. (*Morton v. Welch* (4th Cir.), 162 Fed. 2d 840-2; *Ex parte Haumesch* (9th Cir.), 82 Fed. 2d 558; *Farrell v. Lanagan* (1st Cir.), 166 Fed. 2d 845-7.)

Neither the state Courts on the trial, on appeal, or on habeas corpus found that there was anything remotely suggesting lack of professional skill, ability, loyalty, or devotion of defense counsel to the petitioner and his cause. The Federal Courts are not charged with a review of the strategy of defense counsel. (*Burkett v. Mayo* (5th Cir.), 173 Fed. 2d 574.) A defendant is entitled to a fair trial, not a perfect one. His counsel is not required to be infallible. (*U. S. ex rel. Feeley v. Ragen* (7th Cir.), 166 Fed. 2d 976.)

This is not a case of waiver of counsel but one where the precise question is presented by the record and was before the trial Court. It could have been raised at the hearing or on appeal but Thomas did not so do. The record discloses that he had the effective aid and assistance of counsel. There was a judicial atmosphere throughout the proceedings and the hearing at which Thomas was afforded an opportunity to be heard, to examine the witnesses against him, and to offer testimony was a real one and not a sham or pretense.

Thomas was not, therefore, in the light of the decisions interpreting the Fourteenth Amendment deprived of due process of law. (*In re Oliver,* 333 U.S. 257, 273, 68 S.Ct. 499, 92 L. ed. 682; *Powell v. Alabama,* 287 U.S. 45, 68-70, 53 S.Ct. 55, 77 L. ed. 158, 84 A.L.R. 527; *Hawk v. Olson,* 326 U.S. 271, 273-4, 66 S.Ct. 116, 90 L. ed 61; *House v. Mayo,* 324 U.S. 42, 46, 65 S.Ct. 517, 89 L. ed. 739; *Ex parte Hawk,* 321 U.S. 115, 115-6, 64 S.Ct. 448, 88 L. ed. 572.)

There must be *state action* that causes the deprivation of due process. Obviously the accused's counsel is not such a state official—he is the agent and employee of the accused. A breach of the fiduciary relation between attorney and client cannot vitiate a trial unless it is in some way made known to the convicting Court. (*Hudspeth v. McDonald* (10th Cir. 1941), 120 Fed. 2d 962; *Diggs v. Welch* (D.C. 1945), 148 Fed. 2d 667, 670; *Dorsey v. Gill* (D.C. 1945), 148 Fed. 2d 857, 875; *United States v. Wight* (2d Cir. 1949), 176 Fed. 2d 376, 379, cf., *Swope v. McDonald*

(9th Cir. 1949), 173 Fed. 2d 852.) Then the action of the Court in proceeding with the case with knowledge of the breach of fiduciary relation between attorney and client is the State action which is a violation of due process. (*Powell v. Alabama,* 287 U.S. 45, 53; *Glasser v. United States,* 315 U.S. 60.)

There are over 16,000 attorneys actively practicing in California. It would be complacent naiveté to assume that all these are able or honorable men. If the startling proposition that all these men are "state officials" is to prevail, it should be relatively simple for an accused to buy a lack of due process.

The short answer is that they are not state officials. They are licensed by the state but so are doctors, contractors, barbers and architects. Although they may be characterized "officers of the court" the simple fact is that, under the law of California at least, they are not and never have been considered to be "state officers". (*Cohen v. Wright,* 22 Cal. 293, 315; *Fleming v. Hance,* 153 Cal. 162, 167.)

The prosecuting attorney is a state official not because he is an "officer of the court" but because he is an employee of the sovereign. Thus, if he fraudulently contrives a conviction we have *state action* and a deprivation of due process. (*Mooney v. Holohan,* 294 U.S. 103, 110.)

Judge Denman cites no authority for the proposition that undisclosed intrigue between a client and his attorney can vitiate a trial. We submit that in every case holding that an accused was denied due

process either the Court or prosecuting attorney or both knew they were denying due process. A prosecuting attorney may not promise an accused a light sentence (see *Smith v. O'Grady,* 312 U.S. 329 (1940); *Von Moltke v. Gillies,* 332 U.S. 708 (1947)), but how many hundreds of defense attorneys have promised an accused a light sentence if he pleaded guilty? How can the actions of these 16,000 attorneys be binding on the state?

The perjured testimony cases illustrate clearly that the sovereign must participate in the fraud or unfairness in order to result in a deprivation of due process. A man convicted solely on perjured testimony—an innocent man, let us suppose—was not denied due process in the proceedings resulting in his conviction. (*Tilghman v. Hunter* (10th Cir. 1948); 167 Fed. 2d 661; *Cobb v. Hunter* (10th Cir. 1948), 167 Fed. 2d 888; *Wild v. Oklahoma* (10th Cir. 1951), 187 Fed. 2d 409; *Kelly v. Ragen* (7th Cir. 1942), 129 Fed. 2d 811; *Hodge v. Huff* (D.C. 1944), 140 Fed. 2d 686; cf. *Woollomes v. Heinze* (9th Cir. 1952), No. 13224, decided August 21, 1952.)

On the other hand, if the prosecution, the employees of the sovereign, knew the testimony was perjured the judgment is void. (*Mooney v. Holohan,* 294 U.S. 103.)

Obviously, the injustice to the accused is the same in both cases. In both cases an innocent man has been convicted on perjured testimony. And yet in the one case we have a denial of due process and in the

other we do not. Why? For the simple reason that in the latter case we have state action—we have knowledge by the sovereign that the accused is not getting a fair trial.

In the case at bar no official of the State of California had any idea of this alleged breach of fiduciary relation between Thomas and his counsel. To hold that the State of California denied Thomas due process on these facts is an innovation in the law—an innovation based on a misconception of the Fourteenth Amendment.

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**CONCLUSION.**

We repeat—the questions presented here are of tremendous importance to the People of the State of California and its correctional agencies. We have been following the case of *Dorsey v. Gill* and anticipated the decision of this Court in *Brown v. Allen,* and other cases.

When a petition for habeas corpus replete with general allegations of lack of "due process" has been filed it has been the practice of the district judge to request a copy of the state court proceedings which we furnish. The petition is then considered along with the record and the District Court acts.

In view of the decision in the instant case the District Court will be compelled to "assume" that the bald allegations of the petition are true and an order to show cause and stay of execution will be issued. A

hearing will then follow with an almost automatic appeal, for the Chief Judge will "assume" the truthfulness of the allegations of the petition.

As Judge Frankfurter has pointed out, no jail doors will be opened—just delay and the consequent disrepute that will attach to the judicial process.

We ask this Court to grant certiorari to correct the error of the Court of Appeals.

Dated, San Francisco, California,
October 21, 1953.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
CHARLES E. MCCLUNG,
Deputy Attorney General of the State of California,
*Attorneys for Petitioners.*

**(Appendix Follows.)**

(37 Cal. 2d 74; 230 Pac. 2d 351.)

"[Crim. No. 5201. In Bank. May 1, 1951]

THE PEOPLE, Respondent v. HENRY THOMAS, Appellant.

* * *

Appeal (automatically taken under Pen. Code, § 1239) from a judgment of the Superior Court of Siskiyou County. James M. Allen, Judge. Affirmed.

Prosecution for murder. Judgment of conviction imposing the death penalty, affirmed.

Mark M. Brawman and George A. Tebbe, under appointment by the Supreme Court, for Appellant.

Edmund G. Brown, Attorney General, and Doris H. Maier, Deputy Attorney General, for Respondent.

OPINION

Carter, J. — Defendant, Henry Thomas, having pleaded guilty to murder (Pen. Code, § 187) the Court found the murder to be of the first degree, and imposed the death penalty. The appeal is here by operation of law. Charged with defendant, was William McCain, who pleaded not guilty. McCain was tried, found guilty, and a sentence of life imprisonment was imposed. Also charged with the same crime, and ordered held to answer at the preliminary examination was Joe Cooper, but what disposition has been made of the charge against him, if any, does not appear.

According to the evidence taken when the decree and punishment were fixed, and at the preliminary hearing, Mr. and Mrs. Ainsworth were managing a grocery store near Hatfield, Siskiyou County, California, on October 20, 1950. About 5:30 in the afternoon, while the Ainsworths were present in the store, defendant and McCain entered it, McCain in the lead. Defendant ordered soft drinks. McCain drew a pistol and stated it was a holdup. Defendant also drew a pistol. Ainsworth grasped the barrel of the pistol held by McCain and in the ensuing struggle it was discharged, a bullet striking and wounding Mr. Merrill, who entered the store at that time. After McCain's gun discharged, defendant fired several shots from his pistol, two of which struck Mrs. Ainsworth, causing her death. McCain and defendant fled and were finally apprehended in Bakersfield.

Defendant urges two grounds for reversal: (1) The Court erred in failing to take evidence to ascertain the penalty to be imposed. (2) The penalty should be reduced to life imprisonment under Section 1260 of the Penal Code, as amended in 1949. (Stats. 1949, ch. 1309, § 1.)

Defendant was held to answer following a preliminary examination and an information was filed against him. On December 4, 1950, he was arraigned and not having means to employ counsel, one was appointed for him—Mr. Mark M. Brawman. Time to plead was set for December 6, 1950, at his counsel's request. At that time, after a brief appearance in

Court, counsel for defendant and McCain's counsel, and the district attorney retired to the judge's chambers where the judge said that Mr. Brawman had spoken to him in regard to the possibility of defendant's avoiding the death penalty by making a 'certain' plea. The judge remarked that he had read the transcript of the preliminary hearing and that he was 'inclined' to give the 'extreme' penalty whether he pleaded guilty or not guilty. On returning to Court, the defendant pleaded guilty and December 11, 1950, was fixed as the time for 'pronouncing judgment,' later continued to December 14, 1950, when the Court announced it would hear evidence on the degree of the offense. The district attorney called decedent's husband, Ainsworth, to the stand and he testified to the facts relating to the killing. Defendant's counsel was asked by the Court if he wished to cross-examine and declined. The Court then remarked: 'Step down (addressing the witness). I don't think we will need any further.' The district attorney then made the same remark to which the Court replied 'All right.' Defendant's counsel remained silent. The Court then stated that it was murder of the first degree. Thereafter when asked by the Court whether he had any legal cause to show why sentence should not be pronounced, defendant stood mute. The death penalty was imposed.

There is no question that the evidence is ample to establish murder of the first degree, for it was committed while attempting to commit robbery. (Pen. Code, § 189.) Defendant's excuse for not offering any

evidence on the question of penalty is that the Court's remark heretofore quoted foreclosed such offer. That remark may not necessarily be so construed, and the Court, as seen, did not only take the evidence on the subject consisting of Ainsworth's testimony, but also the evidence given at the preliminary hearing which went into the details of the crime from the planning of it to the flight. Moreover, defendant stood mute when asked if he had any legal cause to show why sentence should not be pronounced and it was not until then that the death sentence was 'pronounced.' The rule is stated: 'In determining the degree of an offense and the punishment to be imposed, after a plea of guilty, it is the duty of the trial Court to consider matters in aggravation as well as in mitigation of the offense. The legal significance of established facts may well constitute an element of which cognizance is taken in the exercise of judicial discretion. A hearing for the determination of the degree of an offense and the punishment therefor is not a trial in the full technical sense, and is not governed by the same strict rules of procedure as a trial. As stated in People v. Williams, 14 Cal. 2d 532, 536 [95 P. 2d 456] (quoting from People v. Popescue, 345 Ill. 142, 153, 158 [177 N.E. 739, 77 A.L.R. 1199], it is "simply a statutory hearing, by which the Court examined witnesses to determine whether any facts existed to aggravate or mitigate the punishment," and "in considering evidence in aggravation or mitigation of the offense the Court may consider many matters *'not admissible on the issue of guilt or innocence'* . . ."'

(People v. Gilbert 22 Cal. 2d 522, 528 [140 P. 2d 9].) And as said by this Court in People v. Forbes, 219 Cal. 363, 372 [26 P. 2d 466]: 'He [defendant] cannot now complain that he sat mute with his attorneys at his side while evidence of his wicked crime was given by the several witnesses. That he offered no evidence, if any there was, which was not included in the ample statements and confessions made by himself and Mrs. Nelson was a matter wholly within the control of his attorneys, who might have examined each witness at length and, no doubt, could have obtained a continuance upon the asking, for the production of evidence tending to mitigate the offense, if such existed.' And also what was said in People v. Jackson, 36 Cal. 2d 281, 288 [223 P. 2d 236], is applicable: 'Finally, there is defendant's argument that the trial Court abused its discretion in imposing the death penalty upon him. The contention seems pointless. Admittedly the homicide here involved was committed in the perpetration of a robbery, and as such constituted murder of the first degree. (Pen. Code, § 189; People v. Bautista, 22 Cal. 2d 867, 869 [141 P. 2d 417]; also, People v. Lindley, 26 Cal. 2d 780, 791 [161 P. 2d 227]; People v. Isby, 30 Cal. 2d 879, 888 [186 P. 2d 405].) While defendant urges that the killing was "accidental . . . precipitated by the unfortunate attempt of the deceased to wrestle the gun from defendant," and that the "Probation Officer reported . . . a recommendation of life imprisonment," these same matters were fully argued at the hearing to determine the degree of murder and the sentence to be imposed therefor.

Their evaluation in the light of the entire record was for the trial Court's consideration, and it unquestionably appears that the trial Court, acting within its discretion and upon a consideration of all the circumstances, fixed the sentence in accordance with the statutory authority vested in it.'

Authority was not granted to the Court by the amendment to Section 1260 of the Penal Code to reduce the penalty from death to life imprisonment in this case for the 'amendment [to § 1260] did no more than bring Section 1260 into accord with Section 1181(6) with respect to reduction of the degree of an offense and make clear that the Court may reduce the punishment in lieu of ordering a new trial, when there is error relating to the punishment imposed. The test for determining what action should be taken remains the same: was there prejudicial error in the proceedings? When, as in this case, the trial Court is vested with discretion to determine the punishment (Pen. Code, § 190), and there has been no error, this Court has no power to substitute its judgment for that of the trial Court.' (People v. Odle, ante, p. 52 [230 P. 2d 345].) There was no error in the proceedings in this case.

The judgment is affirmed.

Gibson, C. J., Edmonds, J., Traynor, J., Schauer, J., and Spence, J., concurred.

Shenk, J.—I concur in the judgment but I do not agree with the very definite suggestion in the majority opinion that this Court has the power under Section

1181(6) or Section 1260 of the Penal Code, even in the presence of error, to reduce the punishment and thus commute the sentence from death to life imprisonment or any lesser period. That power is exclusively vested in the governor of the state by Section 1 of article VII of our Constitution. My views are more fully expressed in my concurring opinion in People v. Odle, ante, p. 52."

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*Supreme Court of California*

CERTIFICATE

People, etc.
v.
Henry Thomas
} Crim. 5201

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court, hereby certify that the following is a true and correct copy of pages 1 to 7, 7a, 8 and 9 of the Reporter's transcript on appeal in the above entitled cause, as shown by the records of my office.

WITNESS my hand and the seal of the court this 25th day of September, A. D. 1953.

(Seal) WILLIAM I. SULLIVAN,
Clerk of Supreme Court of the
State of California.

By HARRY M. GARDISER,
Chief Deputy.

No. 14,190

*In the Superior Court of the State of California, in and for the County of Siskiyou.*

The People of the State of California,
Plaintiff,

vs.

Henry Thomas and William McCain,
Defendants.

Yreka, California
Monday, December 4th, 1950
Honorable James M. Allen, Judge.

Appearances:

For the People: Fred W. Burton, Esq., District Attorney.

For the Defendants: No counsel appearing.

2:00 o'Clock P. M.

The Court. I desire to inform you and both of you that there has been an information filed in this court by the District Attorney of this county charging you with the crime of murder. You are informed that you have a right to be represented by an attorney at every stage of the proceedings in this court. Have you an attorney? You haven't any attorney, is that right?

One of the Defendants. No.

The Court. Mr. Thomas, you have no attorney, and Mr. McCain, you have no attorney?

Defendant McCain. No.

The Court. You have no means with which to employ an attorney?

Defendant McCain. No.

The Court. That doesn't make any difference, because you are entitled to an attorney anyway and we are going to see that you get an attorney whether you have got the money or not. So the next step that I have to take in this matter is to appoint an attorney. The Court will appoint Mark Brawman and C. A. Tapscott as attorneys; that is, we will send for them and see whether they will accept or not.

* * * * * * *

The Court. Mr. Brawman, will you come inside of the rail, please? Mr. Brawman, it is my desire to appoint you as attorney for Henry Thomas. Will you accept such appointment?

Mr. Brawman. Yes, I will, if he will accept me.

The Court (addressing defendant Thomas). Will you accept Mr. Brawman as your attorney? Mr. Brawman was formerly a deputy district attorney; he has had quite a lot of experience and I think you will find he will give you a good representation. Will you accept him as your attorney?

Defendant Thomas. Yes.

The Court. Mr. Tapscott, will you accept the appointment for William McCain?

Mr. Tapscott. Yes.

The Court. Will you accept Mr. Tapscott as your attorney, Mr. McCain?

Defendant McCain. Yes.

The Court. Mr. Tapscott is a veteran lawyer at the bar; he has had success in the defense of criminal cases and I think you will find that he will give you a fair representation. So the court, for Henry Thomas, will appoint Mark M. Brawman and for William McCain, will appoint C. A. Tapscott. (Addressing District Attorney Burton) I didn't notice that you had gone.

Mr. Burton. Well, I was looking for Mr. Brawman; I couldn't find him.

The Court. I will have to repeat what I said. Let the record show that the Court has appointed Mark M. Brawman as attorney for Henry Thomas and the defendant Henry Thomas accepts such appointment and the Court has appointed C. A. Tapscott as attorney for William McCain and Mr. McCain accepts such appointment.

Now, are you ready to proceed with the arraignment up to the plea at this time?

Mr. Brawman. Yes, we are, Your Honor.

The Court. Are you ready to proceed with the arraignment up to the plea, Mr. Tapscott; up to the plea?

Mr. Tapscott. I would think so; I don't know anything about it, but I would think so.

The Court. I mean by proceeding that far, you will have access to a copy of the transcript taken

at the preliminary examination and it will give you a chance to study that, and then after you study that, we can arrange a time for a plea. All right. (Addressing the defendants) You may both stand up, please. (The defendants arise)

(The clerk here reads the information)

* * * * * * *

The Clerk. Henry Thomas, you are informed that if the name under which you have been informed against——

The Court (interrupting). Give each one a copy of the information, and as you hand it to them say "I hereby"———

The Clerk. I hereby hand you, Henry Thomas, a copy of the information and a copy of the reporter's transcript.

William McCain, I hand you a copy of the information and a copy of the reporter's transcript.

Henry Thomas, you are informed that if the name under which you have been informed against, to-wit: Henry Thomas, as set forth on the information, is not your true name, you must now state your true name or you will be prosecuted under the name of Henry Thomas, as set forth on the information. Is that your true name?

The Court. He answers that is his true name.

The Clerk. William McCain, you are informed that if the name under which you have been informed against, to-wit: William McCain, as set forth on the information is not your true name, you must now state your true name or you will be prosecuted under

the name of William McCain as set forth on the information. Is that your true name?

Defendant McCain. Yes.

The Court. All right. Be seated, please. Now, Mr. Brawman, how much time do you want to plead?

Mr. Brawman. Well, let's see.

The Court. Can you plead Thursday of this week?

Mr. Brawman. I think Wednesday at 2 o'clock.

The Court. Wednesday? Wednesday at 2 o'clock. All right, the Court will fix Wednesday, December the 6th at 2 P. M. as the time for taking the plea of each defendant in this case.

All right, I want the sheriff to allow these gentlemen to consult with the defendants at every opportunity that they desire. You can take the defendants away now. Thank you, gentlemen, for your acceptance of the appointment.

No. 14,190

*In the Superior Court of the State of California, in and for the County of Siskiyou.*

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The People of the State of California,
Plaintiff,
vs.
Henry Thomas and William McCain,
Defendants.

Wednesday, December 6th, 1950.
Honorable James M. Allen, Judge.

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Appearances:

For the People: Fred W. Burton, District Attorney.
For the defendant Thomas: Mark M. Brawman, Esq.
For the defendant McCain: C. A. Tapscott, Esq.

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The Court. We have the People v. Thomas and McCain, time for plea. We will have to wait until they get here.

(The defendants here come into court.)

The Court. This is the time fixed by the court for hearing the pleas in the case of the People of the State of California versus Henry Thomas and William McCain. Let the record show that the defendants—both defendants are present in court and the attor-

neys for both defendants are also present in court; and that the district attorney is also present in court at this time. And are you ready to enter your plea?

Mr. Burton. The People are ready to proceed, your Honor.

Mr. Brawman. We are ready to proceed, your Honor, for the defendant Henry Thomas.

The Court. All right. Henry Thomas. (Addressing counsel Tapscott) Are you ready to plead?

Mr. Tapscott. I haven't yet definitely decided on that just yet.

The Court. How much time do you want to decide?

Mr. Tapscott. Well, I was under the impression that there was something else going to be done at this time.

The Court. Do you want to have a conference with the Court?

Mr. Burton. I would like it, your Honor.

Mr. Tapscott. I would be glad to.

The Court. All right, you will step into the chambers and the court reporter will please accompany us. Counsel for the respective defendants and the district attorney and the court reporter will please step into my chambers.

Mr. Brawman. Did you want the defendants?

The Court. No, not the defendants.

(The persons above mentioned here retire to the Judge's chambers.)

* * * * * * *

The Court. Mr. Brawman approached me yesterday and told me that he was ready to enter a certain

plea for his client, but he hoped that he might be saved from the death penalty. I suggested this conference; he said also that the District Attorney, if there was a plea of guilty entered, that he wouldn't insist on the death penalty. I told Mr. Brawman at that time I wanted time to think it over and suggested this conference. And I have since it has been broached to me, I have gone over and read all of the transcript of the testimony, and I want to state that I will not make any bargain of any kind. And I will also state that I would be inclined to give the extreme penalty, whether they plead guilty or not guilty. Now, you can just use your own judgment in the matter.

Mr. Brawman. That you would be inclined to?

The Court. Well, I wouldn't say definitely until I heard all of the evidence and everything of the kind in court, but I just feel that way about it, and it is up to you folks to decide.

Mr. Brawman. Let's have a conference, Clayton.

The Court. All right. Both of you step out.

(Mr. Brawman and Mr. Tapscott here retire.)

* * * * * * *

Mr. Tapscott (re-entering the chambers). I have talked to my man; Mr. Brawman is still talking with his.

(Back in the court room with all parties present.)

The Court. Let the record show that the court is now in session again and that the defendants Henry Thomas and William McCain are present and also their counsel are present, and the district attorney is

also present. Are you ready to proceed to enter your plea?

Mr. Burton. The People are ready.

Mr. Brawman. Ready for the defendant Henry Thomas.

Mr. Tapscott. Ready.

The Court. Mr. Brawman answered ready for Henry Thomas, and Mr. Tapscott answered ready for William McCain. (Addressing defendant Thomas) Henry Thomas, will you stand up and you may ask the defendant on the information, what is his plea, guilty or not guilty.

The Clerk. To the information on file herein, Henry Thomas, what is your plea, guilty or not guilty?

Defendant Thomas. Guilty.

The Court. What was it?

Defendant Thomas. Guilty.

The Court. Guilty. All right, be seated.

The Clerk. William McCain, to the information on file herein, what is your plea, guilty or not guilty?

Defendant McCain. Not guilty.

The Court. All right. The defendant Henry Thomas having pleaded guilty, it devolves upon the court now to set time for pronouncing judgment. The Court will fix in the case of Henry Thomas, the 11th day of December, at 2 o'clock in the afternoon as the time for pronouncing judgment in the case of the People versus Henry Thomas.

Now, in the case of Willie McCain, can you give me an estimate of the amount of time it will take to try this case?

Mr. Burton. Your Honor, I think it will take 4 days.

The Court. Mr. Tapscott, do you think we can try it in four days?

Mr. Tapscott. I really wouldn't know very much about it, but I would concur in his estimate; it probably would come nearer.

The Court. All right. The court will set the case for trial on January the 2nd, at 10 o'clock; January 2nd, 1951 at 10 o'clock.

The court at this time will make an order continuing the law and motion calendar until the next Monday that would be January 8th. I am doing this, setting off the calendar for the reason that the district attorney changes on the 8th and I want, if possible, to get down with this case by that time.

So that will be all, now, in this matter.